United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 74-1658

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

LAWRENCE RALPH and DIVERS OTHERS,

Plaintiffs-Appellants,

v.

THE BETHLEHEM STEEL CORPORATION and UNITED STEELWORKERS OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of New York

BRIEF FOR APPELLEE - UNITED STEELWORKERS OF AMERICA

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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BRIEF FOR APPELLEE UNITED STEELWORKERS OF AMERICA[1/]

Counter Statement of Issue

Did the court below properly grant the defendant Steelworkers' motion for summary judgment with respect to plaintiffs' cause of action for an alleged breach of the duty of fair representation?

Counter Statement of the Case

This is an appeal from a decision and order of the court below, per Curtin, J., entered on January 3, 1974 (App. 5-22),

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1/ Hereinafter referred to as "Steelworkers" or "the Union."

granting defendant Steelworkers' motion for summary judgment with respect to plaintiffs' cause of action for an alleged breach of the duty of fair representation in processing certain of their grievances pursuant to the collective bargaining procedure established in the contract between Steelworkers and the Bethlehem Steel Corporation (hereinafter "Bethlehem" or "the Company"). Additionally, the court held (App. 21) that judgment should be entered against the plaintiffs with respect to their interrelated subsidiary § 301 claim against the Company for breach of contract. 2/

Preliminarily, it should be emphasized that this Statement reflects undisputed facts based upon affidavits and exhibits thereto submitted by the defendants in support of their respective motions for summary judgment and contained in the comprehensive record made before the district court. As we shall demonstrate, the district court properly concluded that the counter affidavit and testimony adduced in depositions upon which plaintiffs relied in an effort to defeat said motions did not raise a genuine issue of material fact and defendant Steelworkers was entitled to judgment as a matter of law (Rule 56(c), F. R. Civ. Proc.).

2/ Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides, in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of Facts

The plaintiffs in this action are 471 mechanical and electrical maintenance employees in the strip mill of the Lackawanna, New York plant of the Bethlehem Steel Corporation. Their jobs are to perform the servicing and maintenance of machinery and equipment in the seven (7) steel producing units operating within the strip mill. Those units are: hot mill proper, hot mill shipping, continuous pickler, tandem mills, coil skin mills, annealing and cold mill shipping.

The events in question which gave rise to plaintiffs claim against Steelworkers and Bethlehem are essentially as described below.

Throughout the entire basic steel industry many employees are paid a standard hourly wage rate ("SHWR") and in addition receive incentive earnings over and above their SHWR. Among the longstanding concerns of the Steelworkers was to insure that the average hourly earnings of all employees within the industry performing similar duties would be equal.[3/] In 1956, on the basis of statistical data compiled by Steelworker staff technicians at the International's Pittsburgh, Pennsylvania headquarters, it was determined that the average hourly earnings of Bethlehem's employees had fallen below that of the other major companies. Further, the Steelworkers believed that this development was at least partly attributable to the fact that incentives paid

3/ The Steelworkers negotiated a Job Description and Classification Manual ("CWS") with the industry in 1953. The purpose was to classify all jobs in the basic steel industry according to certain objective criteria and, further, to establish standardized rates of pay for all employees industry-wide, irrespective of where the plant was located and which employer was involved (A.218-19) Theis Aff., par. 5).

by Bethlehem were too low (A. 220 ; Theis Aff., par. 7).

Accordingly, at the behest of the International Union a series of top level negotiation meetings were held with Bethlehem representatives which successfully culminated in the execution of a Supplemental Agreement to the 1954 basic agreement between the parties.[4/] The Supplemental Agreement on incentives became effective on May 25, 1956 (A. 220 ; Theis Aff., par. 7). It was applicable Company-wide to all employees of Bethlehem. The key provisions were (A. 220, 233-236):

(1) All the incentive plans which had been established previously were to be replaced by management with new incentive plans under which the incentive base rates were to be the applicable standard hourly wage rates (Section 5(a));

(2) Section 5(b) provided: "... where an existing incentive plan shall be replaced with a new incentive plan... the new incentive plan... shall meet the requirement that, over a past representative test period, the average hourly earnings of all employees assigned to a job under such a new plan would not have been less under such a new plan than the average hourly earnings received by all the employees assigned to that job during such period under the incentive plan which it replaced."

4/ The Steelworkers was represented by President David McDonald, General Counsel Arthur J. Goldberg and several staff technicians, including Ben Fischer and William Theis. Bethlehem was represented, inter alia, by Vice President Larkin and Counsel John J. Morse (A. 220 ; Theis Aff., par. 7).

(3) Consistent with customary managerial prerogatives, Bethlehem was authorized to establish and implement such new incentive plans. The review and replacement by the management of incentive plans which complied with the Supplemental Agreement was to be commenced promptly and continued until all of the Company's incentive plans were revised accordingly (Section 5(f)).[5/]

(4) The Union had the right to file grievances insofar as the new incentives did not meet the standards contained in the Supplemental Agreement; and, further, the parties agreed to "appoint a joint committee to review such grievances which ha[d] not been disposed of in step No. 4 of the grievance procedure" (Section 5(e)). (A. 221 (Theis Aff., par. 8); A. 134 (Evenden Aff.)).

This innovative procedure for referring incentive grievances to a special "joint committee" composed of persons experienced in this highly specialized problem area became known as the "4 1/2 step." It resulted from the recognition that incentive grievances arising out of the Supplemental Agreement frequently would be so complex and technical that the parties at the local level, often less familiar with such intricacies, would not be able adequately to understand and evaluate the merits of such grievances. The "4 1/2 step" was intended to give the technicians on both sides an opportunity to look at each incentive grievance filed

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5/ This reflected the parties' recognition that the Supplemental Agreement entailed an enormous undertaking which was destined to take a considerable period of time to complete (A. 221 ; Theis Aff., par. 8).

by local unions throughout the Bethlehem Corporation and to enable the Union representatives on the committee to evaluate it in light of the Supplemental Agreement with a view either to making a settlement, withdrawing it, or processing it to arbitration. In any event, it was contemplated that the Union would rely on their judgment as to what was warranted in the particular circumstances present (A.221-22; Theis Aff., par. 9).

The "4 1/2 step" also afforded a centralized mechanism whereby the Steelworkers could avoid "overloading" the arbitral process, for example, by selecting one among numerous individual grievances which presented a common issue and submitting only that one to arbitration, provided that it would govern the outcome of all such similar grievances (Ibid.).

Shortly after the Supplemental Agreement went into effect the Steelworkers appointed three persons to serve as its representatives on the Joint Incentive Committee (the "Committee" or JIC"). Those appointed were: Bill Jacko, Chairman; William Theis, Secretary; and George Frey, member. Jacko and Frey had formal industrial engineering training (A. 222 ; Theis Aff., par. 10). They performed a variety of functions, including: (1) participating in an extensive series of informational meetings attended by staff representatives who serviced local unions at Bethlehem plants located throughout the country and the key local union grievance committeemen at such plants to explain as simply as possible the contents of the Supplemental Agreement on incentives and how it would be administered; (2) participating along with Bethlehem representatives on the Committee in discussions with

local union officials, rank and file employees directly affected, and local plant management to explain the operation of the new incentives as they were established; and (3) participating in "4 1/2 step" meetings where incentive grievances had not been resolved at earlier steps (A.222-23; Theis Aff., par. 11).

The revision of all the existing incentives involved complex computations and testing. The implementation of the plan in each department consumed many hours and extended over a period of many months. The conversion which began in the mid 50's continued throughout the 60's (A. 7, 171-182, 118-119). New incentive plans were developed and instituted by local management for the production workers of the strip mill of the Lackawanna plant during the period 1959-1960, as follows: April 12, 1959 (tandem mills); May 3, 1959 (hot mill proper); November 29, 1959 (annealing); February 28, 1960 (continuous picklers); and April 10, 1960 (skin mills) (A. 7-8, 136-137; Evenden Aff.). These incentive plans are commonly referred to as "direct plans" since they deal with compensation of production employees whose contribution to the output of the strip mill is susceptible to direct measurement and is therefore termed "direct" (A. 136-137 (Evenden Aff.); A. 8).

Further, in April 1960, Bethlehem established two incentive plans for the electrical and mechanical maintenance jobs in the strip mill (Ibid). The Company considered these plans to be "indirect plans" since they dealt exclusively with compensation of maintenance employees whose contributions to production are not susceptible to direct measurement (A. 137, 8-13). Under these indirect plans the electrical and mechanical maintenance

employees' incentive compensation was based upon the performance (i.e., output) of the seven production units in the strip mill. Thus, their incentive compensation depended upon and could be calculated only after determining the incentive compensation for the production workers in every one of the contributing direct units within the strip mill (A. 137-138 (Evenden Aff.); A. 173-174 (Williamson Aff.);[6/] App. 9).

As the direct and indirect plans were implemented throughout Bethlehem's operations, including those specifically referred to above, the Steelworkers' local unions filed various grievances alleging that in one respect or another each did not conform to the Supplemental Agreement.

The grievances were processed through the contractually established grievance-arbitration procedure. Many such grievances were resolved informally in the initial four steps. However, a substantial number were not resolved and ultimately were processed to the Committee at the "4 1/2 step" level. There the International Union representatives were called upon to exercise their discretion and judgment on a case-by-case basis as to whether it was in the best interests of the employees directly

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6/ "Indirect employees [were] paid an incentive rate that represents 67% of the weighted average of the percent performance above 100% of all the units contributing to the indirect plan. Thus, if the weighted average of the direct units' present performance is 110%, the indirect employees would then be entitled to 67% of the 10%, or 6.7% ..." (A. 173-174, Williamson Aff.).

concerned and the overall effectiveness of the grievance-arbitration procedure to attempt to negotiate a voluntary resolution, to submit the dispute to final and binding arbitration by the Permanent Umpire, or to withdraw the griveance for lack of merit (App. 222-223; Theis Aff., par. 11).

As the first round of grievances reached the "4 1/2 step", the Union members of the Committee, after analyzing them on an individual basis, selected a representative cross section of those which raised fundamental and important issues of contract interpretation and submitted them to arbitration (App. 223-224 (Theis Aff.); App. 10-11). This resulted in a full scale arbitration hearing before Umpire Ralph Seward concerning approximately fifteen (15) grievances covering the range of problems involved (Ibid.).

In essence, the Steelworkers contended that the new incentives were improper because: (1) they did not provide "equitable compensation" to the affected employees; (2) they did not provide an adequate rate of participation for so-called "indirect workers" (i.e., workers who did not directly determine the amount of output or production of a particular machine (e.g.); and (3) they were partly based upon estimates of "maximum possible output" which were unfair and unrealistic (App. 11, 234).

On February 25, 1959, Umpire Seward issued a comprehensive twenty-three (23) page award which in large measure rejected the Union's claims (App. 11). He reasoned as follows (App. 224-26, 240-44):

"The Umpire gathers that as to all such grievances the Company's position has been the same as that outlined above; i.e., that the sole contractual issue that could properly be raised by such a grievance was whether or not the new standard-hourly-wage-rate-based incentive plans conformed to the requirements of Section 5(b) of the May 25th Agreement and that all other issues were irrelevant. The selected cases have been brought to the Umpire, essentially, as a means of testing the validity of the Company's position. It is this general question, therefore, that must first be answered.

"The Umpire will state his answer immediately. He finds that as to any straight incentive replacement under the May 25th Agreement -- i.e., where the Company does not incorporate in the new incentive plan adjustments then being made to offset technological changes -- the Company's position is correct. In such a case the sole standard which the Company must meet as a matter of contract obligation is that set forth in Section 5(b).

* * * *

"If Section 5(b) applies, the only inquiry permitted him [the arbitrator] is into the question of whether the plan meets the test of comparative earnings during the 'past representative test period' provided in that section.

* * * *

"Raising incentive base rates to the level of the standard hourly wage rates would necessarily alter the pre-existing relationships between production, incentive earnings and the minimum guarantee. Earnings under the new plans, in most cases, would rise more sharply with increases in production (and fall more sharply with decreases) than had been true under the old plans. In most cases, also, the level at which employees would begin to 'make out' -- i.e., to receive incentive earnings over and above their standard hourly wage rates -- would be different. Faced with this situation, the parties provided in Section 5(b) that earnings under the new plan must at least equal earnings under the old

> plan at the production level achieved during a 'past representative period.' In Section 5(d) they defined the term 'past representative test period' as meaning, in the absence of special circumstances, the period of three months next preceding the date on which the new plan replaced the old. If -- as applied to the actual production achieved during this 'test period' -- the new plan would have produced earnings at least equal to those which the old plan did produce, the new plan meets the standard of Section 5(b).
>
> "This is the sole standard set forth in that section. The fact that in periods of increased or decreased production -- i.e., periods in which production exceeds or falls below the levels achieved during the 'past representative test period' -- earnings under the new plan may not be the same as under the old is clearly irrelevant in applying this standard." (Emphasis added.)

The arbitrator's award was, by agreement, final and binding on both parties. After it issued, Union members of the JIC met and discussed the potential ramifications with the Union's top level officials and legal advisors. The combined judgment was that the clear teaching of Seward's award was that the Union would have only a limited, narrow basis for challenging in arbitration any new incentive plans established under Section 5(b) of the Supplemental Agreement (App. 226 (Theis Aff.)).

Thereafter, as noted, commencing in April 1959 and continuing through April 1960 management instituted new incentive plans for the production employees in various contributing units within the strip mill at Lackawanna. Then, on April 17, 1960, a new incentive plan was implemented for the electrical and mechanical maintenance employees.

As to certain of the direct plans for production workers, the Union was in some respect successful in challenging them. Thus, for example, when inadequacies in the incentive rate for production workers in the hot mill properly were disclosed by Union representatives during the course of a 4 1/2 step grievance meeting with Bethlehem representatives on or about October 25, 1960, the Company agreed to revise certain portions of the new plans. Further, grievance meetings relating to Union challenges to incentive plans instituted for production workers in the tandem mills, annealing department and the #2, #3 and #5 skin mills were also responsible for certain revisions in their incentive rates. (App. 141-145 (Evenden Aff.). See also, App. 9).

The result was that the direct plans applicable to the production workers in the foregoing operating units were prospectively[7/] adjusted at various times beginning in May 1961 and continuing until June 1962. In turn, each of the indirect plans was simultaneously adjusted prospectively. However, retroactive payments were made only to the direct workers on a unit by unit basis. As stated previously, computation of the

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7/ After certain portions of the plans for the hot mill proper and tandem mills were revised prospectively in May 1961 (and retroactive payments were made to the direct employees), the Union representatives initially determined that there was no meritorious basis for continuing to process the grievances (B-2137 and 2336) relating to those two plans. Consequently, the Union intentionally did not notify the Company prior to the July 15, 1961 deadline (agreed to by the parties) that it considered the revised rates unsatisfactory.
(Cont'd on p. 13)

incentive rates for the electrical and mechanical maintenance employees (i.e., indirect workers) required a determination of the incentive rates for all of the contributing operating units, and since some of those incentive rates for production workers in operating units other than mentioned above were still the subject of pending grievances, the Company determined that it would be more efficient, expeditious and accurate to await their resolution before making any retroactive adjustments to the indirect employees (App. 9, 141-145 (Evenden Aff.)).

Among the many grievances filed by Local 2604 were B-3139 and B-3141. They were processed through the grievance procedure in the usual fashion. Third step meetings were conducted between management and local union representatives at the Lackawanna plant on November 28, 1960, and February 12, 1961, respectively. It is clear from the minutes of these meetings that B-3139 and 3141 were but two of a large number of related grievances wherein Local 2604 sought to challenge a variety of new incentive rates established by management throughout its departments at Lackawanna. (App. 10-12; 269; Trost Aff., par. 8).

Thus, in B-3139, the Union explained the basis of its third step grievance as follows:

7/ (Cont'd)
Thereafter, however, at the behest of some dissatisfied production employees in those units, the International Staff representative reluctantly agreed to process the grievances to arbitration. On May 23, 1963, Umpire Seward held that the grievances were not timely filed to arbitration and dismissed them (App. 143, 288-289, 358-363).

> "The Union disagrees with the new rate instituted by the company on the following positions (see, attached sheet)*. The Union maintains that the above positions are direct workers instead of indirect and should be paid as such; also the Union disagrees with the test representative period that the company has used for the method of payment. The Union requests Management to pay the above positions retroactive pay. The Union also contends that the rates are unreasonable and unfair. This request is made pursuant to Article V, Section 2(c), paragraph 3 of the Agreement."
> * Sheet attached to grievance gives list of grievants and their positions.

In grievance B-3141, the Union explained its position in similar terms (App. 269, 278, 282, 12).

Bethelhem denied the grievances at the conclusion of the step 3 meeting. They were then processed up to and including arbitration. On November 27, 1962, a hearing was scheduled before Umpire Seward. In the interim, the International Union staff representative and various local union grievance committeemen met and agreed upon certain strategy to pursue at the hearing. Specifically, the decided that since all the employees involved in B-3139 and 3141 serviced and repaired equipment they could not qualify as direct workers. Second, as indirect workers their incentives would depend upon the incentive plans applicable to the direct workers in each of the contributing units of the strip mill (i.e., the seven production units), some of which were presently the subject of separate grievances filed by the Union. Consequently, the Union representatives decided that the most

practical approach was to request the arbitrator to remand B-3139 and 3141 to the third step pending the outcome of the grievances challenging the incentive plans for the direct workers in the operating units (App. 12-13, 270 (Trost Aff. par. 10)).

Consistent with the foregoing, the Steelworkers representatives appeared before the Umpire on November 27, 1962, and advised as follows:

> "The Union has agreed to withdraw the issue that mechanical and electrical maintenance jobs be designated as direct and the parties have agreed to remand these two grievances to Step No. 3 of the grievance procedure, pending the disposition of [incentive] rates cases involving the units which contribute to the Electrical and Mechanical Incentive Plan." (App. 13, 270, 280-287).

Thereafter, on August 9, 1963, these grievances were considered, once again, at a third step meeting. No resolution resulted. At the fourth step meeting in October 1963, the grievances still remained unresolved.[8/] However, management expressly represented that if as a result of the pending grievances filed on behalf of the direct employees in the contributing units any adjustments were made in their incentives then such adjustments would also apply to the electrical and mechanical maintenance employees -- retroactively and prospectively (App. 13, 271).

8/ The Local Union withdrew its earlier claim that because the new incentive rates for electrical and mechanical maintenance employees were based upon a 3-month split period prior and subsequent to the July 1959 steel strike they failed to satisfy the "representative test period" standard established in Section 5(b) of the Supplemental Agreement. That decision was made after the Union representatives had determined that the same'representative test period' had been utilized by management in establishing incentive plans for some direct workers in production units and, further, that upon analysis this was a favorable period (App. 14, 271-273).

On June 3, 1964, these two grievances were considered by the Joint Incentive Committee at the 4 1/2 step. After studying and analyzing the files for these grievances and the prior ruling of Umpire Seward, the International Union representatives agreed with their management counterparts that there was no basis for submitting the cases to arbitration because there were "no remaining open issues" (App. 14, 227-230). Thus, the minutes of that meeting relevant to B-3139 and 3141 state as follows:

> "The Committee noted that Article V, Section 2(c) of the Agreement dated January 4, 1960, cited in the Union's brief does not apply to these grievances because, as indicated under 'The Issue' in that brief, the incentives in question were established pursuant to Section 5(b) of the May 25th Agreement. The Committee also noted that the Local Union withdrew the issues relating to the past representative test period and the designation of the incentives as indirect at the arbitration hearing on November 27, 1962. The statement of the Company representative at the Step No. 4 meeting in October, 1963, in respect of these grievances that any adjustments which may be made in incentives which serve as components of the incentives involved here will also apply to these incentives confirms the established policy of the Company which the Committee has understood and agreed to. That policy precludes the existence of any issue in these grievances relating to component incentives as to which there are unresolved grievances.
>
> "Accordingly, the Committee finds that there are no remaining open issues in these grievances" (App. 227-228). (Emphasis added)

As International Union representative Theis explained in his uncontroverted affidavit (App. 228-229): (1) As a result of Umpire Seward's 1959 award, the Union members on this Committee knew that they could not attack the plans for failing to provide "equitable compensation" because that standard was found

to be immaterial where, as here, a new incentive plan is established under Section 5(b) of the Supplemental Agreement; (2) the Local Union Grievance Committee had previously withdrawn its challenge to the validity of the "representative test period" used by management and its claim that the electrical and mechanical maintenance employees were direct rather than indirect workers. Even assuming those issues had not been withdrawn previously, it was the judgment of the Union Committee members that there was no meritorious reason to pursue arbitration on either score (App. 14-15, 227-229); and (3) in making the judgment that no issue remained open for arbitration, the International Union representatives had only one purpose in mind -- to carry out their responsibilities fairly, reasonably and honestly. They were mot motivated by any personal hostility or animosity to any employee-grievant, including the plaintiffs herein (Ibid.).

In the normal situation this would have been the end of the grievances in question because the International Union has exclusive authority to determine which grievances are to be processed from Step 4 to arbitration. However, at the Lackawanna plant there is a longstanding practice by which the Local is empowered to submit a case to arbitration even over the objection of the International Union. And that is what happened here. At the behest of the employees involved, Local 2604 insisted that these grievances go to arbitration (App. 15, 231 (Theis Aff., par. 17)).

A hearing took place before Umpire Seward on November 18, 1964. International representative Jardin, the Union's chief spokesman, made the argument that the new incentives affecting employees in Grievances No. B-3139 and 3141 were defective for not producing "equitable compensation." But the Arbitrator noted that he had rejected this same argument in his landmark 1959 award:

> "THE UMPIRE: Here is what you have. This is what you have got before me, and it grows out of decisions and problems which go back to 1958 and 1959 after the May 25th Agreement was first being put into effect. You remember those big cases down in New York.
>
> "MR. JARDIN: Yes. You were the Arbitrator, too I remember.
>
> "THE UMPIRE: That is right. And as I held then, and as the May 25th Agreement clearly provides, when you have just a simple substitution of a standard hourly wage rate based incentive for one of the old incentives, what the parties have provided in the May 25th Agreement is just this one standard that the Company has to meet, and that is the past representative test period ....
>
> "If the incentive is so engineered that applying it with the adjustments to the proper production which was made [in] the past representative test period, ... [the] production comes[s] out with equal earnings, the incentive as the parties have written this Agreement is O.K.
>
> "That does not mean that if the production record later on was lower, that earnings won't drop below the past representative test period. Or if they go higher, they will go above.
>
> "But the test the parties set up was that for the particular production experience of that particular 3 months, if the incentive as adjusted meets those earnings than it is O.K. <u>And I am powerless under the May 25th Agreement to apply any other standards</u> (App. 341-343).

* * * *

> "Now, unless I am mistaken you have a case here in which, it seems to me, that none of the issues you can raise under the May 25th Agreement are before me" (App. 343).

Even though the Union representatives at the 4 1/2 step recognized that there were really no issues left to arbitrate, Jardin pressed several additional arguments at the hearing (App. 329-352). Ultimately, however, on July 12, 1965, Umpire Seward issued an award stating that:

> "[o]n the basis of the records before [me] -- the minutes of the 3rd and 4th step meetings, the pre-hearing statement, the minutes of the Joint Incentive Committee meeting of June 3, 1964, and the record of action taken with respect to certain of these grievances at a prior Umpire hearing -- the umpire must hold that ... the issues properly raised by these grievances have either been withdrawn or settled by the parties themselves." (App. 374)

Accordingly, he concluded that since no remaining open issues were present the grievances should be dismissed (Ibid) (App. 374).

The last grievances concerning the incentive plans for the direct workers in the contributing units at the strip mill were finally resolved on December 16, 1966. At that point the Company for the first time was in a position to calculate accurately the retroactive back payments, if any, due to the indirect workers -- the electrical and mechanical maintenance employees involved in Grievances B-3139 and 3141 (App. 144-145, 147).

The Company then discovered that certain production records were missing which precluded a precise computation. At the Union's insistence, the Company utilized an alternative method of computation to arrive at a retroactive schedule of payments for each job involved. Without conceding that any back payments

were actually due, the Company offered an $89,000 lump sum settlement for the period from April 1960 - June 1966. At a Union meeting held on or about June 16, 1966, the employees involved, upon advice of counsel Mr. Soctt, who they had just retained, (App. 428-429) voted to reject the offer and, instead, institute this action (App. 148-149, 184-184, 274, 397, 429). Consequently, to date the Union has not taken any position on the question whether the amount offered was satisfactory, or, instead, should be challenged through the grievance arbitration procedure. (App. 21).

The decision of the court below

Based upon the entire record in this case, including the affidavits and exhibits attached thereto, excerpts from the transcript of depositions taken by plaintiffs and the answers submitted by the parties to certain questions raised by the court sua sponte (Order dated March 16, 1973), the court determined that "no controversy [existed] about any of the essential facts" and, further, defendants were entitled to judgment as a matter of law (App. 6-7, 19-22).

In doing so, the Court found in essence that the uncontroverted facts demonstrated that the Union's conduct in handling and processing several grievances affecting the plaintiffs' incentive rates did not constitute a breach of the duty of fair representation under federal law. We show below that this decision is entitled to affirmance on review.

ARGUMENT

The District Court's Grant of Summary Judgment For the Steelworkers on Plaintiffs' Claim of Unfair Representation Should be Affirmed.

A. The Governing Legal Principles

At the outset we shall briefly discuss the legal framework within which the Steelworkers' conduct in processing and handling plaintiffs' grievances must be judged. It is now well settled that the duty that a union owes to the members of the bargaining unit it represents is derived exclusively from federal statutes. The National Labor Relations Act, 29 U.S.C. Section 151 et seq., is the primary source of this federal law. Section 7 of the Act, 29 U.S.C. Section 157, gives to employees the right to bargain collectively through representatives of their own choosing. Section 9(a), 29 U.S.C. § 159(a), provides that "representatives [so] designated by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative for all employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment..." (Emphasis added).

By its terms this statutory provision confers an extraordinary grant of power upon the majority representative -- i.e., the status of exclusive representative for all employees in the

bargaining unit -- union members and non-members alike.[9/] The judicial gloss placed upon this language is that this broad grant of authority is equally applicable to the Union's role in administering and enforcing as well as negotiating collective bargaining agreements. See, for example, Vaca v. Sipes, 386 U.S. 171, 190-193 (1967); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Steele v. Louisville & N. R. Corp., 323 U.S. 192, 198-199 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Simberlund v. L.I.RR, 421 F.2d 1219, 1224 (2d Cir., 1970); Nedd v. UMW, 400 F.2d 103 (3rd Cir., 1968).
Indeed, the processing of disputes concerning the meaning, application or interpretation of the contract through grievance-arbitration channels is part and parcel of the collective bargaining process itself whereby meaning is given to the agreement. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). The result of the foregoing is that not only is the Union empowered to negotiate collective bargaining agreements on behalf of all bargaining unit employees it likewise is empowered to process grievances and generally administer and enforce the agreement on their behalf.

To insure that this grant of extraordinary authority was not exercised indiscriminately to the detriment of the employees concerned, the Supreme Court at an early date carved out of the fabric of the federal labor statutes and imposed upon unions as the exclusive representatives ". . . a responsibility of equal

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9/ This essentially reflected the Congressional judgment that exclusive representation was necessary to insure an effective, workable system of collective bargaining. See discussion in Vaca v. Sipes, infra.

scope, the responsibility and duty of fair representation" of all bargaining unit employees.

The initial spate of decisions defined the nature and scope of that newly created legal duty thusly: the exclusive representative is required ". . . to make an honest effort to serve the interests of all these [bargaining unit] members, without hostility to any" and its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, supra, 345 U.S. at 337-338. Accord: Humphrey v. Moore, supra, 375 U.S. at 342; Steele v. Louisville & N. R. Corp., supra 323 U.S. at 198-199. Following the dictates of the Supreme Court's foregoing pronouncements, numerous circuit courts, including this one, emphasized that improper motivation was the touchstone for stating and proving a claim for breach of the duty of fair representation. See, for example, Cummingham v. Erie RR Co., 266 F.2d 411, 417 (2d Cir. 1959) ("This duty was no more than to forbear from 'hostile discrimination.' The arbitrariness shown must be of the bad faith kind. . . . Something akin to factual malice is necessary"); Balowski v. UAW, 372 F.2d 829, 835 (6th Cir. 1967); Brady v. TWA, 401 F.2d 104 (3rd Cir. 1969), cert denied, 393 U.S. 1048; Bruen v. Local 492, IUE, 313 F. Supp. 387, 392 (D. N.J., 1969), aff'd, per curiam, 425 F.2d 190 (3rd Cir. 1971); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 185 (9th Cir. 1962), cert. denied, 371 U.S. 920.

In its landmark 1967 decision in Vaca v. Sipes, supra, the Supreme Court repeated and reaffirmed the standard it had previously enunciated in Humphrey v. Moore and Ford Motor Co. v. Huffman, supra -- namely, that a breach of the statutory duty occurs where discriminatory and/or bad faith conduct is proven. Additionally, the Court referred in several instances to the Union's obligation not to act "arbitrarily in administering the grievance and arbitration machinery of the contract as exclusive agent for all employees (id. at 191-94). In doing so, however, the Court took great pains to emphasize that the Union must be accorded substantial discretion to make honest, good faith judgments to settle grievances short of arbitration.

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.
>
> "In L.M.R.A. Section 203(d), 61 Stat. 154, 29 U.S.C. Section 173(d), Congress declared that 'Final adjustment by a method agreed upon by the parties is. . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. ... Moreover, both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved.
>
> * * * *

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully [citations omitted]. It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. Section 203(d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration." (Emphasis added).

In harmony with this analysis, the Vaca court reversed the Missouri Supreme Court decision which was grounded on the theory that if the plaintiff could establish that his grievance was meritorious under the contract then the Union's conduct in settling such grievance short of arbitration constituted unfair representation. In reversing, the Supreme Court stressed that the Union's conduct should be judged by whether its decision to settle the grievance was made honestly, non-arbitrarily and in good faith, not whether the grievance was meritorious under the provisions of the contract (id. at 191-195). For the Court to have adopted the latter standard would have placed the judiciary in the untenable position of having to interpret the contract to determine the merits of grievances, thereby usurping the union's function in the grievance-arbitration procedure established by the parties. Cf. Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960).

Post-Vaca, the circuit courts have on numerous occasions been called upon to apply and give meaning to the reference to "arbitrary" conduct. In Simberlund v. L.I. RR Co., supra, 421 F.2d at 1224, this Court initially held that "to state a claim for breach of the duty of fair representation justiciable in the federal courts, it must be alleged that the union acted in bad faith;" it then cited with approval (id. at 1225) its prior formulation in Cummingham v. Erie RR Co., 266 F.2d at 477, that "before a union can be charged with arbitrary or discriminatory action it must be shown that the union acted in bad faith" (emphasis added). See also, Steinman v. Spector Freight System, Inc., 441 F.2d 599, 603 (2d Cir. 1971). This holding that bad faith is a necessary prerequisite to "arbitrary" action clearly represents the majority view among the circuits. See, Dill v. Greyhound Corp., 435 F.2d 231, 238 (6th Cir. 1970) (hostility, malice or bad faith is required); De Arroyo v. Sindicato de Trabajadores, 425 F.2d 281, 284 (1st Cir. 1970) (" ... due care has not been made a part of the union's duty of fair representation ... the employee must prove arbitrary or bad faith conduct - variously referred to as the absence of honest purpose and judgment and/or the presence of hostility or discrimination - on the part of the union to prove that it has breached its duty"); Bazarte v. United Transportation Union, 425 F.2d 869, 872 (3rd Cir. 1970) (" ... proof that the union may have acted negligently or experienced poor judgment is not enough to support a claim of unfair representation"). But see, Griffin v. UAW, 469 F.2d

181 (1974) where the Fourth Circuit embraced a contrary conclusion that even absent any evidence of bad faith it is possible for a union to pursue such an arbitrary course of conduct as to constitute a violation of the federal duty of fair representation.

In any event, this divergence of opinion within the circuits need not detain us here. For the court below measured the Steelworkers' conduct against the most favorable legal standard possible from the plaintiffs' standpoint.[10/] It found (App. 21) that "plaintiffs have failed to show any personal animosity, hostility, ill will, bad faith, poor judgment, negligence, inattention or any other act which would indicate in any way that the Steelworkers representatives did not carry out their duties as carefully as possible."

Without conceding that in any circumstances poor judgment or mere negligence would suffice to establish "arbitrary" conduct under the test laid down in Vaca this much is clear: Even assuming that perfunctory handling of a meritorious grievance is actionable absent any attendant bad faith or discriminatory motivation the Steelworkers were nevertheless entitled to summary judgment here.

10/ Appellants' brief (p. 14) incorrectly characterizes the test applied by the district court as requiring proof of "personal animosity, hostility, ill will, and bad faith."

B. Applying these Principles to the Instant Facts

The uncontroverted evidence attests to the comprehensive and vigorous efforts expended by the Steelworkers on behalf of the Bethlehem employees, including plaintiffs. The International Union, through its staff technicians at the Pittsburgh Headquarters who scrutinized average hourly earnings of employees throughout the major basic steel companies, initially uncovered the fact that as of 1956 Bethlehem's employees had fallen below the industry average because of their inadequate incentive rates. This revelation prompted the International to initiate a series of top level negotiating sessions with Bethlehem's officials which successfully culminated in the May 1956 Supplemental Agreement.

The same concern for the interests of bargaining unit personnel characterized the International's conduct in the subsequent administration and enforcement of the Agreement. First, it took steps to insure that the thousands of employees who would ultimately be affected by the new, highly complex incentive plans which management was developing would receive effective representation. Thus, the Union devised an innovative 4 1/2 step in the grievance-arbitration procedure whereby a joint incentive committee consisting of three representatives each from the International and Bethlehem with special expertise and training in the complexities of incentive plans was accorded the authority to evaluate the merits of incentive grievances filed by local unions. In this manner, the International created a central mechanism whereby knowledgeable and responsible persons with an overview of the

objectives to be achieved by the Supplemental Agreement were empowered to evaluate the merits of each grievance with a view either to making a settlement, withdrawing it or processing it to final and binding arbitration.

The foregoing attests to the simple fact that the International's actions in discerning the need for improved incentives, negotiating a Supplemental Agreement to achieve that purpose, and creating a new procedure for handling of incentive grievances were a far cry from "perfunctory" conduct. The manpower, time, financial resources and expertise expended by the International totally belies any such claim. And it is noteworthy that the plaintiffs did not come forward in the district court with any evidence to refute these facts.

The same conclusion is equally compelling with respect to the manner in which the International thereafter sought to administer the Supplemental Agreement generally. Thus, as explained, the Union members of the Committee at the 4 1/2 step level, after analyzing and studying numerous grievances challenging the adequacy of newly established incentive plans, selected a representative cross-section of about 15 grievances which raised important issues of first impression under the Supplemental Agreement and submitted them to arbitration.

In essence, the Union contended that the new incentives were improper, inter alia, because they did not provide "equitable compensation" to the affected employees or an adequate rate of compensation for the indirect workers, such as plaintiffs. The

Union pressed that position during the course of a full scale hearing before Umpire Seward in which it was represented by one of the International's most experienced staff technicians.

The Umpire rejected the Union's claims in a lengthy analytical award issued February 25, 1959.[11/] He determined that where, as here, a new incentive plan was installed purely as a replacement (rather than to offset technological changes) then the only contractual basis upon which the Union could challenge such plan was that it did not meet the test of comparative earnings during the "past representative test period." Given the final and binding nature of Seward's landmark determination, the Union members of the JIC at the 4 1/2 step had no realistic choice but to accept the fact that subsequent grievances would have to be scrutinized carefully lest submission to arbitration would constitute an unnecessary expenditure of money and manpower.

Within this general framework, we turn to the specific grievances relevant to this proceeding. On or about April 17, 1960, management at Lackawanna instituted a new plan covering the mechanical and electrical maintenance employees in the strip mill.

11/ The Court may wish to take official notice of the uncontroverted fact that Mr. Seward was the longstanding Permanent Umpire under the Bethlehem-Steelworkers contract and, as such, was familiar with the complexities of the standard hourly wage rate and incentive earnings systems. Thus, he was uniquely qualified to interpret the 1956 Supplemental Agreement and to pass upon the merits of the Union's challenge to various incentive plans developed by the Company.

Shortly thereafter, the Local Union challenged those plans (Grievances No. B-3139 and 3141). Among the claims made were that the plans were generally unreasonable because they did not generate adequate compensation for the employees, that they should be direct not indirect and that the representative test period was improper. The Union withdrew these claims at various stages in the grievance processing.

This litigation was commenced in 1966 essentially to challenge those actions. During the early stages the nub of plaintiffs' claim was that under their interpretation of the Supplemental Agreement the grievances were meritorious because the incentive plans failed to yield "equitable compensation" and, consequently, the Union had not represented them fairly by virtue of the foregoing decision to withdraw those grievances.[12/] Plaintiffs soon realized, however, what should have been apparent from the outset-namely, that in a breach of the duty of fair representation case it is not the court's province to sit in judgment of the Union's discretionary determination that a grievance lacks sufficient merit to justify aribtration. This is the square holding of Vaca, supra, 386 U.S. at 192-195. Moreover, even assuming a union's erroneous assessment of the merits to be

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12/ This is reflected in Plaintiffs' Memorandum accompaying its Supplemental Interrogatories filed on March 26, 1968. (App. 2)

actionable, the uncontroverted evidence establishes here that Umpire Seward's 1959 award expressly forclosed any possibility that the Union could prevail in arbitration on the general argument that the incentive plans should be set aside as unfair or unreasonable. So too, the Union's decision to withdraw the claim that the maintenance employees were "direct" workers was readily sustainable on substantive grounds. As the court below concluded, that decision was "consistent with good judgment and a sensible construction of the contract" (App. 20-21).[13/]

In the instant appeal, plaintiffs have understandably abandoned these particular contentions in support of their unfair representation claim. Instead, they have grounded their appeal (brief, pp. 9-15) exclusively upon two much more narrowly defined areas in which the Steelworkers allegedly performed its duties in an "arbitrary or perfunctory manner" (brief p. 9). Those allegations relate specifically to: (1) the Union's failure to insist that the retroactive payments to indirect workers be made to coincide with the retroactive payments to production workers; and (2) the "inaction" by the Union in not contesting the incentive rates applicable to the direct workers in the hot mill proper and tandem mill which, in turn, is alleged to have adversely affected

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13/ On the basis of the uncontroverted evidence, the court below also found (App. 19) "it is absolutely clear that there was no showing of any bad faith or negligent act on the part of the Union representative in determining the 'representative test period' to be used." See also, App. 13-14, 271-273, 209-215.

the plaintiffs' incentives as indirect workers (brief, p. 9). We deal with these contentions in detail ad seriatim.

As a general proposition the simple but complete answer to plaintiffs is that throughout the course of the extensive discovery procedure they were unable to adduce any evidence sufficient to raise a factual question concerning whether Steelworkers acted in bad faith or with improper motivation when handling their grievances. Likewise, plaintiffs failed to come forward with any evidence to demonstrate that the Steelworkers alleged "inaction" constituted a perfunctory refusal to process meritorious grievances on their behalf.

The comprehensive affidavits submitted by the responsible Steelworker officials show that the Union recognized at the outset that the incentive rates to be developed for indirect workers in the strip mill would be dependent upon the incentive rates applicable to all of the producing units. Stated otherwise, the incentives earned by employees in each of those producing units were components of and contributed to a determination as to what the electrical and mechanical employees would be entitled to receive.

Commencing in May 1959 and continuing through April 1960, the Company established and implemented new incentive plans covering each of the seven producing units within the strip mill. A series of grievances were filed challenging the adequacy of many of these plans. As a result of the discussions which took

place in the initial steps of the grievance procedure, the Company agreed to revise certain portions of those plans prospecitvely. The adjustments took place at various times in 1961 and 1962. Upon their effective dates the adjusted plans were used in calculating incentive rates for indirect workers as well as the direct workers. Thus, contrary to the implication of plaintiffs' brief (p. 9), the indirect workers immediately derived the benefit of such adjusted plans.

Simultaneously with the prospective adjustments which were agreed to at various times in 1961 and 1962, the Company distributed retroactive payments (to April 1960) to the direct workers in most of the producing units. The actual distributions took place on a unit by unit basis as soon as agreement was reached between the parties (during the course of grievance meetings) to revise the incentive plans initially implemented by the Company.

However, since the retroactive payment, if any, due to each of the indirect workers was dependent upon a resolution of the incentive grievances relating to all seven (7) contributing units, the Company took the position that it "would be more efficient, expeditious and accurate to await the resolution of all outstanding grievances dealing with direct units prior to making any retroacitve adjustments to the indirect employees" (App. 142).

The Union agreed with the logic of the Company's position but in approving the procedure it obtained a commitment that electrical

and mechanical maintenance employees would receive the retroactive adjustment, if any, to which they were entitled upon resolution of all pending producing unit grievances. That commitment was obtained on or before the step 4 meeting in October 1963, and reaffirmed in the 4 1/2 step minutes of June 2, 1964 (App. 262).

Thereafter, in 1966 the Company and Union finally resolved the incentive rate grievance for the last of the producing units (i.e., the continuous picklers). At that juncture, however, when the Company undertook to determine whether the indirect workers were entitled to a retroactive adjustment for the period April 1960 - June 1962, it learned for the first time that certain relevant records were missing. The end result, as explained, was that at the Union's insistence the Company embarked upon an extensive effort to devise and apply an alternative formula to measure the retroactivity, if any, owed to plaintiffs. Ultimately, the Company offered $89,000 in a lump sum settlement. The Union never formally had an opportunity to accept and/or challenge the reasonableness of that amount through normal grievance channels because the plaintiffs-members on advice of their newly retained counsel voted to reject the offer and initiate this action in lieu thereof.

Plaintiffs have never come forward with any evidence which raises a factual issue concerning the validity of the Company's assertion that this delay in making retroactive payments was

consistent with the objective of accuracy and efficiency -- let alone to show that the Union's decision to accept this procedure was improperly motivated or made in bad faith. Rather, plaintiffs seek to saddle the Union with liability on the novel theory that it should have anticipated or reasonably forseen that the delay would result in the loss of Company records which, in turn, allegedly caused plaintiffs to lose money.

Once again, there is no factual predicate to support this theory. The uncontroverted testimony of the Company's Chief of Payroll was that this was the first time in his thirty-five (35) years at the Lackawanna Plant that employee production worksheets had ever been lost or misplaced (Rosser depo. pp. 119, 3-4; see also Aff. of plaintiffs' counsel Wm. Scott at App. 295). There was no reason to believe that such an administrative foul-up would occur. Thus, even assuming (which we deny) that negligence on the Union's part would suffice to state a claim for unfair representation no such showing has been made here. On the contrary, the record establishes that the Union took reasonable steps to insure that plaintiffs would receive whatever retroactivity they were entitled to when all the producing unit grievances were resolved.

In the foregoing circumstances, the court below properly found on the basis of the uncontroverted evidence that:

> "[I]t is difficult to fault ... the decision to delay the processing of the grievances [relating to plaintiffs' quest for retroactive payments] ..." (App. 21)
>
> "But even if [the Union's] judgment was bad, plaintiffs must show more to be successful in the lawsuit. Plaintiffs have failed to show any personal animosity, hostility, ill will, bad faith, poor judgment, negligence, inattention or other act which would indicate in any way that the Steelworkers' representatives did not carry out their responsibilities as carefully as possible" (Ibid).

Nor have plaintiffs advanced their cause by the further piecemeal assertion (brief, pp. 9-12) that Steelworker representative Jardin failed to represent the employees properly in the arbitration hearing in Grievances B-3139 and 3141. To support that assertion plaintiffs place exclusive reliance on two factors: (1) that in his deposition Jardin stated that he carried out his duties at the arbitration hearing on November 18, 1964 with "my tongue in my cheek;" and (2) during that hearing Jardin incorrectly advised Umpire Seward that 4 of the 5 direct unit grievances were as yet not resolved (brief, pp. 9-100.

With respect to the former, plaintiffs are merely attempting to lift a quote divorced from the context in which it was made and expand it into a conclusionary admission of "arbitrary and perfunctory conduct." On closer scrutiny, however, the undisputed record discloses the futility of that effort. First, it must be remembered that the International Union, as a result of decisions made by local union grievance committeemen in conjunction with the

staff representative, had already determined that there were no remaining issues open to be submitted to arbitration and, accordingly, Grievances B-3139 and 3141 were initially dropped. Staff representative Jardin was aware of that development as well as the merit in the decision not to pursue the grievances to arbitration. He also understood that the Local Union, over the International's objection, had insisted that these grievances be processed through to arbitration. In this context, then, the court below justifiably found (App. 17) that "Jardin's remark about proceeding with 'my tongue in my cheek' was simply a candid appraisal of the hopelessness of pressing the grievance to arbitration, made by an experienced negotiator."

As noted, Jardin was thus placed in the unusual position wherely he was responsible for presenting a case which the International had determined to be non-meritorious. In those circumstances, if his representation "was anything less than enthusiastic it may well have been due to the well founded belief that the grievance was unjustifiable" (Watson v. IBT, 399 F.2d 875, 880 (5th Cir. 1968). Yet, in point of fact, the transcript of the hearing (App. 329-352) shows the vigor with which Jardin argued to the Umpire in support of the local's cause -- albeit one which he considered futile. It is true that the Umpire ultimately dismissed the grievances in July, 1965, but that decision in no way establishes that Jardin acted in a perfunctory manner; on the contrary, it shows that he correctly assessed the weakness of his position on the merits.

Second, plaintiffs apparently are now contending that if Jardin had not incorrectly advised Umpire Seward on November 18, 1964, that the incentive grievances concerning 4 or 5 producing units were still pending, the Company would have been ordered to make a prompt distribution of retroactive back pay checks to the indirect workers. This claim misconceives the nature of the dispute which was the subject of the aribtration hearing. It involved the question whether the new incentive plan for indirect maintenance workers satisfied the standard of the Supplemental Agreement. The grievance related to the plan itself not, as plaintiffs would have us believe, the manner or timing of the retroactive back payments to indirect workers.

Thus, assuming that Jardin had accurately reported that all but one of the producing unit grievances had been resolved the outcome of the arbitration would not have varied one iota: first, because the retroactive calculations for indirect workers could not be finally determined until all the producing unit grievances were resolved and, second, the distribution issue was not even before the Umpire on that occasion. As the court below concluded (App. 17) "whether or not one or four units had been previously settled would not in any way affect the decision of the umpire in grievances B-3139 and 3141." In sum, there is no record evidence to support plaintiffs' claim of perfunctory handling of a meritorious grievance.

Plaintiffs' related attempt (brief, p. 10) to attribute an improper motive to Jardin's statement is also totally devoid of

record support. No evidence was adduced to show that he was intentionally misstating the facts so as to undercut the grievants' position. At most, Jardin was negligent in failing to report accurately on a matter peripheral to the core issue of that arbitration. And, as explained, it is well settled that mere negligence does not constitute a breach of the duty of fair representation. See, for example, Bazarte v. United Transportation Union, supra, 429 F.2d at 872; De Arroyo v. Sindicato de Trabajadores, supra, 425 F.2d at 284.

Finally, plaintiffs (brief, pp. 9, 12) seek to create a triable issue of fact arising out of the manner in which the Union handled the incentive grievances of the direct workers in the hot mill and tandem units. The undisputed record facts, once again, readily dispose of this contention.

The incentive rates for the indirect workers depend upon the aggregate of the incentives applicable to each of the contributing units, including those for the hot mill and tandem mill. In April 1960, the Company unilaterally established and implemented new plans for the direct workers in those two units. The Union thereupon filed grievances. During the course of the early steps in the grievance procedure the Union succeeded in obtaining revisions to certain portions of the plans effective May, 1961. Thereafter, the Union representatives determined that there was no meritorious grounds for continuing to challenge the revised plans under the Supplemental Agreement. Accordingly, when

the deadline arose for submitting the grievances to arbitration they chose not to process it further. Employee dissatisfaction with that decision subsequently developed and the Union reluctantly agreed to submit the grievances to arbitration where Umpire Seward held that they were untimely.

Of particular significance, as the district court found (App. 17-18) the record is totally silent as to any demonstration that the untimely filing was due to any perfunctory refusal to process a meritorious grievance. Rather, it resulted from a conscious judgment grounded upon an assessment that the grievances lacked merit. In view of Umpire Seward's 1959 award foreclosing the Union from challenging anything other than the "representative test period" -- an issue not present here -- that judgment was eminently sound. Moreover, even if this Court were to conclude otherwise any deficiencies in the Union's conduct would fall far short of sustaining an unfair representation claim. For "[T]he union has an obligation in exercising its power as bargaining agent to act fairly under the collective bargaining agreement and not to assert or press grievances which it believes in good faith do not warrant such action". Bazarte v. UTU, supra, 429 F.2d at 872.

CONCLUSION

The extensive affidavits and attached exhibits filed by the Union representatives contain a detailed accounting both of the steps taken in handling and processing the relevant incentive grievances and the reasoning which led them to exercise their

judgment in the particular manner described. On their face the affidavits ineluctably establish that the Union has not acted in bad faith, with hostility or discrimination, or perfunctorily handled any meritorious grievances.

At the culmination of lengthy pre-trial discovery in which plaintiffs availed themselves of the opportunity to depose key union and company officials, counsel for plaintiffs came forward with a counter affidavit cross referencing these depositions. As we have shown, it did not controvert any of the material facts upon which the Union's motion for summary judgment rested. Thereafter, in the abundance of precaution, the district court sua sponte requested counsel for all parties to respond to a series of pertinent questions designed to probe in further detail whether any genuine issue of material fact remained which would warrant a trial. Upon receipt of those responses and after an examination of the entire record, the court below determined that summary judgment should lie for defendants. That decision, we submit, is clearly entitled to affirmance on review.

Respectfully submitted,

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